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No. 03-1500

Supreme Court, U.S.
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In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

On the grounds of the Texas State Capitol there is one prominent religious symbol: a large Ten Commandments monument between the Capitol and the Supreme Court. The hundreds of pages of briefs filed by Respondent and its amici cannot obscure the fact that the Ten Commandments are a preeminent symbol of some, but not other, religions and that they express a profoundly religious message: there is a God and that God has commanded rules for behavior.

The position taken by Respondent and its amici in defending this monument has no stopping point. Under its approach, the State of Texas could put any religious symbol anywhere on the Capitol's grounds. The United States' brief, for example, emphasizes that the Ten Commandments monument is permissible because it is a private donation, because there are other statues on the Capitol's grounds, and because religion has been part of the foundation of American law and society. Brief for the United States ["U.S. Brief"] at 5. By this view, the State of Texas could put a statue of Christ anywhere on its statehouse grounds, even atop the Capitol dome, so long as it was donated by someone else, was one of several monuments in the Capitol complex, and was said to convey the importance of Christianity as part of the history of Texas.

As with any Establishment Clause challenge to a religious symbol on government property, the factual context matters greatly. Unfortunately, the State's presentation of the facts is at best disingenuous and is clearly inconsistent with the record in a number of key ways:

• The Ten Commandments monument is the only evident religious symbol on the State Capitol's grounds. The State repeatedly says that there are other religious symbols on the grounds of the Texas State Capitol. *See, e.g.,* Respondent's Brief ["Resp. Br."] at 2, 5, 13. However, unlike the Ten Commandments monument, no reasonable

observer would perceive these other symbols to be religious. For example, the State says that on a monument honoring children in Texas, one of several children has a small cross around her neck. Resp. Br. at 13. As the photograph in the record shows, this cross is too small to be noticeable to most observers. (Exhibit 20, J.A. at 136).

The State also points to the Aztec symbol on the Six Flags Over Texas display on the floor of the Capitol Rotunda. Resp. Br. at 1, 2 n.3, 13. One of the six flags is the Mexican flag and the State says that a symbol on this flag – a brown eagle, eating a serpent while perched on a prickly pear – is religious. (Exhibit 40, J.A. at 163). At most, the observer would recognize the Mexican flag and it is doubtful that many people would know that the eagle eating a serpent is a religious symbol. The official description of the Six Flags display, which is in the record, does not even mention that there is a religious symbol within it. (Exhibit 40, J.A. at 165). In fact, the State's witness at trial described this as part of Aztec mythology about the location of the capitol, not as religious. J.A. at 67.

The only other religious symbols the State points to are a World War I monument which says "God – Country – Peace" (Exhibit 16, J.A. at 132) and two untranslated Latin phrases that appear on a Confederate Flag high atop a building and behind the bench in the old Supreme Court chambers. Resp. Br. at 2, 13. None of these is anything like the Ten Commandments monument which is the only sacred text on the Capitol's grounds and the only religious message.

• No other monument, and certainly no religious symbol, is visible when one stands before the Texas Ten Commandments monument. Although there are other displays in the area north of the Texas Capitol, they are obscured by hedges when one stands in front of the Texas monument.[1]

[1] Texas misleadingly describes the Ten Commandments as being "surrounded by six other monuments." Resp. Br. at 8, 18. As the

(Continued on following page)

The photographs in the record show that the Ten Commandments monument stands by itself. (Exhibits 48, 53, 57, J.A. at 210-212). Texas attempts to refute this by including aerial pictures of the Capitol as attachments to its brief. (Attachments A and B to Resp. Br.). Of course, from the air, all of the Capitol's grounds and monuments are visible. But the perspective of the reasonable observer certainly cannot be what is seen from a helicopter or low-flying airplane. From the perspective of a passerby, the Ten Commandments monument is just like the impermissible creche in *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 598 n.48 (1989): a free-standing religious symbol with no others immediately visible, but with other symbols in a larger area.

• The Ten Commandments monument is large and sits in a uniquely prominent place. Texas attempts to minimize the monument as insignificant, saying that it is the "back door of the Capitol" and that it is one of the smallest monuments. Resp. Br. at 13, 15. To the contrary, as the State argues later in its brief, Resp. Br. at 20-21, the monument is in a particularly important location, "on a line drawn between the Supreme Court and the Capitol Rotunda, about 75 feet from the Capitol Building, and 123 feet from the Supreme Court Building." *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003). The monument is large and conspicuous, standing six feet high and three and a half feet wide. *See* Appendix C to Petition for Writ of Certiorari, at 21; Exhibit 21, J.A. at 137. No one walking outside from the State Capitol to the Texas Supreme Court could possibly miss it at the intersection of the two sidewalks that run in front of these buildings.

photographs in the record demonstrate, this is false. J.A. at 210-212. The few other monuments north of the Capitol are hundreds of feet away (Stipulation 31, J.A. at 95) and are obscured by hedges.

The simple reality is that the Texas legislature put the Ten Commandments monument between the State Capitol and the State Supreme Court to convey a religious message and that is what it does. A central argument by the State and its amici is that the Ten Commandments are there to convey the role of religion as a foundation for American law. Resp. Br. at 20. However, the monument standing by itself in this location conveys the message that the Ten Commandments are *the* source of American law. The government can place the Ten Commandments on government property as part of an overall display about the sources of law.[2] But that is not what Texas has done and its large Ten Commandments monument thus violates the Establishment Clause.

ARGUMENT

I. THE TEN COMMANDMENTS MONUMENT EXPRESSES A RELIGIOUS MESSAGE AND IS A RELIGIOUS SYMBOL.

A. The Ten Commandments Are Religious In Their Origin And Their Content.

The State and its many amici care deeply about the Ten Commandments monument remaining on the State Capitol's grounds precisely because the Ten Commandments are such an important symbol to some religions. As this Court explained in *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam): "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose

[2] As explained below, this is why the vast majority of Ten Commandments displays cited in the United States' brief and various amicus briefs are acceptable under the First Amendment: they are accompanied by other symbols, both secular and religious, and are part of unified exhibits about sources of law that express a clearly secular message.

can blind us to that fact." The religious content of the Texas Ten Commandments monument is heightened by the presence of a symbol of Christ and two Stars of David.

The State attempts to distinguish *Stone v. Graham* because it involved schools. Resp. Br. at 45-46. Although, of course, this is true, that does not affect the central point of *Stone v. Graham*: the Ten Commandments are a religious text and many of the Commandments "concern[] the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day." 449 U.S. at 42.[3]

The State and its amici attempt to deemphasize the religious content of the monument by arguing that the Ten Commandments monument is there for a secular purpose: to convey the importance of the Decalogue as an influence on law and culture. *See, e.g.*, Resp. Br. at 31-32; U.S. Br. at 10-12, 15-19. There are several problems with this argument. First, the presentation of the Ten Commandments on the Texas monument emphasizes its religious content and gives no indication of its secular role. On the monument, the words "I am the Lord Thy God" are at the very top and prominently displayed in letters larger than the rest of the monument (*see* Appendix C to Petition for Writ of Certiorari, at 21; Exhibit 21, J.A. at 137), rather than

[3] It is suggested that *Stone v. Graham* is a "weak precedent" because it was "a cavalier summary reversal." Brief of Amicus Curiae, Thomas More Law Center, at 5. To the contrary, as Justice White explained, the summary reversal in *Stone v. Graham* reflected the Court's recognition that displaying the Ten Commandments in classrooms was a clear and obvious violation of the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263, 284-85 (1981) (White, J., dissenting) ("Just last Term, the Court found it sufficiently obvious that the Establishment Clause prohibited a State from posting a copy of the Ten Commandments on the classroom wall that a statute requiring such a posting was summarily struck down.") This Court repeatedly has cited approvingly to *Stone v. Graham*. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 679-80 (1984).

being in the same size type and a part of the First Commandment as they are for many religions. *See, e.g.,* Solomon Goldman, *The Ten Commandments* 19-20, 28-29 (1956). There is absolutely nothing on or near the monument that would indicate to the reasonable observer that it is there because of the role of the Ten Commandments as part of the development of secular law.

Second, the presence of the Ten Commandments monument as the *only* monument remotely concerning the sources of law conveys the message that it is *the* foundation of American law. There is a dispute over whether the Ten Commandments played a significant role in the development of American law because they were rarely mentioned early in American history and they are substantially about religious behavior.[4] No one – not the State of Texas or any of its amici – contends that the Ten Commandments are the only source, or even the preeminent source, of American law. But that is exactly the message that is conveyed by it being alone on a "direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building." *Van Orden v. Perry*, 351 F.3d at 181.

This is exactly why the vast majority of the Ten Commandments symbols around the country cited by the State and its amici are distinguishable from the monument at issue in this case: they are part of overall displays in which the Ten Commandments is one of many symbols about the sources of law. For example, the two displays

[4] *Compare* Brief of Amicus Curiae, Anti-Defamation League and Philip A. Cunningham, at 7-20, *with* Brief of Amicus Curiae American Center for Law and Justice, at 3-26. However, this dispute over the importance of the Ten Commandments in American law just highlights that Texas has acted for the purpose of advancing a religious view that the Ten Commandments are a foundation of secular law and its monument conveys the message that the Ten Commandments are *the* basis for American law.

mentioned in the State's brief illustrate this distinction. Resp. Br. at 41. The frieze above the bench in the Supreme Court has images of Moses, Confucius, Mohammed and secular figures including Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall, and thus clearly is about lawgivers through history. *See County of Allegheny*, 492 U.S. at 653 n.13 (Stevens, J., concurring in part and dissenting in part) (describing the religious symbols as part of an overall display). Similarly, the display in the E. Barrett Prettyman Federal Courthouse mentioned in many of the briefs (*see, e.g.,* Resp. Br. at 41; U.S. Br. at 1a), also has tributes to Blackstone, Hammurabi, and other sources of law. See http://www.dcd.uscourts.gov/court-history.html. In fact, this is true of virtually all the displays listed in the Appendix to the United States' brief.

Such displays, which contain multiple secular and religious symbols about the sources of law, do not violate the Establishment Clause.[5] Contrary to the assertion in the United States' brief, Petitioner does not contend that "the Commandments can never be displayed in any manner." U.S. Br. at 29. Rather, Petitioner's position is that the Ten Commandments are a religious symbol and can be displayed on government property only if it is clear that they are present for reasons other than expressing a religious message.[6] Although that is true for a great many of the Ten Commandments displays mentioned in the

[5] Different issues are presented if the secular displays are not added until after the Establishment Clause challenge has been filed. *See Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309 (2000).

[6] The Amicus Brief of the Baptist Joint Committee, at 3-10, sensibly explains that the government's display of sacred text should be understood as endorsing that text, unless the government visibly and objectively negates that endorsement. But nothing on the Texas Ten Commandments monument in any way negates the government's endorsement for the message contained on it.

State and amici briefs, it is not so for the Texas monument which stands by itself.

B. Differing Religions Have Varying Versions Of The Ten Commandments And The Choice Of A Version Prefers Some Religions Over Others.

There is no single version of the Ten Commandments. Religions that regard the Ten Commandments as sacred have different versions and these differences are enormously important in the theology and belief systems of religions.

Respondents argue that the Texas Ten Commandments monument is "nonsectarian" because the Fraternal Order of Eagles consulted with "Jewish, Catholic, and Protestant representatives" in devising the text. Resp. Br. at 44 n.33. First, there is no such thing as a "nonsectarian" version of the Ten Commandments because many religions, and those who do not believe in religion, completely reject the Ten Commandments as a religious symbol and reject its message that there is a single God who has issued commandments for behavior. *See, e.g.,* Brief for the Hindu American Foundation and Others Representing the Interests of Hindus, Buddhists, and Jains, at 2 (characterization of the Ten Commandments monument as nonsectarian "ignored the effect of the Ten Commandments monument on non-Judeo-Christians, whose beliefs regarding the nature of God and the relationship between man and God different greatly from those enshrined in the monument and for whom the Monument is clearly and unavoidably 'sectarian.'") As Justice Blackmun observed, "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *County of Allegheny*, 492 U.S. at 615 (Blackmun, J., concurring).

Second, the fact that the Fraternal Order of Eagles consulted with "representatives" of different faiths does not make the content of the monument non-sectarian. To the contrary, the Texas monument is almost identical to the Protestant, King James Bible version. *See* Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere,* Fordham L. Rev. (forthcoming 2005) (the Fraternal Order of Eagles monuments have "a translation that comes from the Protestant King James Bible.") This is evident in countless ways. The Jewish version of the Ten Commandments, for example, has the First Commandment proclaiming, "I the Lord am Your God who brought you out of the land of Egypt, from the house of slavery." *See* Jewish Publication Society of America, *The Torah: The Five Books of Moses* 134 (1962); Solomon Goldman, *The Ten Commandments* 19-20, 28-29 (1956). The Texas Ten Commandments monument adopts the Christian and not the Jewish version of the Decalogue by elevating the "I am the Lord Thy God" language apart from the Commandments and by completely omitting the text about God bringing the Jews out of Egypt. *See* Brief Amici Curiae of the American Jewish Congress, et al., at 19. This deletes a core part of the Jewish faith's emphasis on the covenant between God and the Jewish people tracing to God leading the Jews from bondage in Egypt. *See id.* at 20.

The monument adopts the Protestant version of the Second Commandment which prohibits "graven images" and rejects the Catholic version of the Second Commandment which usually omits this. United States Catholic Conference, Inc., *Catechism of the Catholic Faith* 561 (1991). This distinction reflects central differences in worship and theology between these faiths. *See* John C. Holbert, *The Ten Commandments* 10 (2002).

The Texas monument adopts the King James Bible version saying, "Thou shalt not kill," and rejects the Jewish version which says, "You shalt not murder." Jewish theologians, and others, place great significance on this

difference as to important issues such as capital punishment and whether killing in war is justified. *See* W. Gunther Plaut, ed., *The Torah: A Modern Commentary* 557 (1981).

There are many other ways that the Texas monument adopts the Protestant version of the Ten Commandments and rejects the versions of other faiths. *See, e.g.,* Brief Amici Curiae of the American Jewish Congress, et al., at 18-23. Contrary to the assertion of the United States, these are not simply variations in "translation." U.S. Br. at 28-29. These are differences which go to fundamental aspects of religious faith and practices. No matter who the Fraternal Order of Eagles consulted, the version of the Ten Commandments between the Texas Capitol and the Texas Supreme Court is sectarian in its origin and message.

II. THE GOVERNMENT'S PLACEMENT OF A LARGE TEN COMMANDMENTS MONUMENT BETWEEN THE TEXAS STATE CAPITOL AND THE TEXAS SUPREME COURT VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT FAVORS SOME RELIGIONS OVER OTHERS, BECAUSE THERE IS NO SECULAR PURPOSE, AND BECAUSE THE EFFECT IS IMPERMISSIBLY TO ENDORSE RELIGION.

A. The Ten Commandments Monument Violates The Establishment Clause Because It Favors Some Religions Over Others.

This Court has explained that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). This Court has stated that "[t]he First Amendment mandates governmental neutrality between religion and religion. . . . [T]he State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute."

Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968). At the very least, any government preference for some denominations over others must meet "strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. at 246.

The Texas Ten Commandments monument is a "denominational preference": it is a religious symbol and conveys a religious message adopted by some religions and not others, and indeed expresses one faith's version of the Ten Commandments at the seat of the Texas state government. Contrary to what the United States asserts, this does not mean that the Ten Commandments never can be displayed or that "universal sectarian agreement" is needed for religious symbols to be on government property. U.S. Br. at 29. Tablets, in the shape some religions believe that Moses received, *without text* – such as appear above the Supreme Court's bench – obviously are different from the Texas monument which has the text of one denomination. Moreover, the government can place the Ten Commandments, with its text, along with symbols of other religions in an overall display with a clearly secular purpose, such as a commemoration of religious diversity. But the choice of Texas to place just the Protestant version of the Ten Commandments between the Texas Capitol and the Texas Supreme Court is exactly the favoritism among religions that the Establishment Clause forbids.

The State contends that this Court in *Lynch v. Donnelly* held that the prohibition of government discrimination among religions does not apply to displays of religious symbols. Resp. Br. at 44. That is not at all what *Lynch* said. In *Lynch*, this Court upheld the presence of a nativity scene on government property because it was accompanied by many other symbols that made clear that it was part of the celebration of the December holiday season. The Court stated that there was no discrimination among religions because the overall message was clearly secular: "It is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are

unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*." 465 U.S. at 687 n.13. Although the Court upheld the holiday display in *Lynch*, it accepted that the government may not discriminate among religions in placing religious symbols on government property.

B. The Ten Commandments Monument Violates The Establishment Clause Because There Is No Legitimate Secular Purpose For The State's Installing It On Government Property Between The Texas State Capitol And The Texas Supreme Court.

This Court has stressed that the government violates the Establishment Clause if its "actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987), *quoting Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). The State says that it need show "only a single legitimate secular purpose for the display to satisfy [the secular purpose] requirement." Resp. Br. at 26. But this is incorrect under the law of the Establishment Clause. As Justice O'Connor explained, the requirement for a secular purpose is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. at 691 (O'Connor, J., concurring). The government violates the Establishment Clause if its primary purpose is to advance religion, even if some secular purpose can be invoked for its action. *See Edwards v. Aguillard*, 482 U.S. at 594; *Stone v. Graham*, 449 U.S. at 41.

In addition to its claim that the Ten Commandments monument is secular because of its supposed role as a foundation of American law, discussed above, the State identifies two other possible secular purposes. First, the State argues that the purpose of the monument is to honor the Fraternal Order of Eagles. Resp. Br. at 27-29. But this argument, too, has no stopping point: under the State's

view, the government could place any religious symbol anywhere on its property so long as it came as a gift. It is for this reason that in *County of Allegheny* the nativity scene in the county courthouse was declared unconstitutional even though there was a similar dedication indicating that it was donated by a private group. 492 U.S. at 600. Likewise, in *Stone v. Graham*, it did not matter that the Ten Commandments posted in public school classrooms were financed by private donations. 449 U.S. at 42. The government cannot evade the Establishment Clause when it erects a religious monument simply by proclaiming that it was donated by others and was placed to honor the donors.

Nor is it credible that Texas chose to place the Ten Commandments between its Capitol and its Supreme Court to honor the Fraternal Order of Eagles. Neither a person viewing the monument or reading the State's brief could discern what role the Fraternal Order of Eagles played in Texas or nationally that would cause Texas to honor this organization. Resp. Br. at 27-29. Also, the monument itself has not been designated an historic landmark; it is the entire Capitol grounds which have received this status. J.A. at 103-11. Even if the State wished to acknowledge the Fraternal Order of Eagles at the time it accepted this gift, this cannot change the fact that the only plausible purpose for displaying the monument in its uniquely prominent place is because of its religious content.

Second, the State offers a new purpose for keeping the Ten Commandments monument: it has become a historic landmark. Resp. Br. at 38-39. There is absolutely no indication in the record that this is the State's "actual purpose" for keeping the Ten Commandments monument. *See Edwards v. Aguillard*, 482 U.S. at 585 (stressing that the focus is on the government's "actual purpose.") There is nothing on or near the monument to inform the reasonable observer that it is there as a historic landmark, rather than as an obvious religious symbol and message.

Nor can an otherwise impermissible religious symbol on government property be saved just by the government labeling the object a historic landmark.

Moreover, the passage of time cannot justify a government action that violates the Constitution; there is no statute of limitations for Establishment Clause claims. In *School Dist. of Abbington Township v. Schempp*, 374 U.S. 203 (1963), this Court invalidated a 50-year-old statute requiring the recitation of Bible passages in public schools. *See id.* at 240-41 (Brennan, J., concurring) (explaining why the longevity of a practice does not immunize it from Establishment Clause challenges).

The State of Kentucky in *Stone v. Graham*, like Texas in this case, chose to display the Ten Commandments because some religions regard them as singularly important, but invented secular rationales to justify its action. As the Court explained in *Stone v. Graham*, "no legislative recitation of a supposed secular purpose can blind us to th[e] fact" that purpose of displaying the Ten Commandments on government property is to express a religious message and that such a purpose violates the Establishment Clause. 449 U.S. at 41.

C. The Large Ten Commandments Monument Between The Texas State Capitol And The Texas Supreme Court Violates The Establishment Clause Because It Is An Impermissible Government Endorsement of Religion.

Texas concedes that the Ten Commandments monument violates the Establishment Clause if the reasonable observer would perceive it as impermissibly endorsing religion. Resp. Br. at 11. Three factors make it likely that the "reasonable observer" would see the Texas Ten Commandments monument as impermissibly endorsing religion: its placement, its context, and its content.

1. The placement of the Ten Commandments monument.

This Court has stressed that the presence of a religious symbol at the seat of government conveys a particularly powerful message of government endorsement of religion. In *County of Allegheny*, this Court emphasized that the nativity scene in the county courthouse was unconstitutional because of its display in a central location. As Justice O'Connor noted, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government. . . . [B]y permitting the display of the creche in this particular physical setting, the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." *County of Allegheny*, 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment).

The State tries simultaneously to argue that the Ten Commandments monument is in an inconspicuous place, Resp. Br. at 14, and that it is at a very important spot to convey the significance of the Decalogue as part of civil culture. Resp. Br. at 20. Apart from the tension between these two arguments, the State's position ignores that the *only* monument at the sidewalks in front of the State Capitol and State Supreme Court is the Ten Commandments and that this conveys the "unmistakable message" that the government "supports and promotes" the religious message on the monument. *County of Allegheny*, 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment).

2. The context of the Ten Commandments monument.

Standing in front of the Ten Commandments monument one sees no other monuments. The photographs in the record show that the other monuments in the area

north of the Capitol are a distance away and are obscured by hedges. *See* Exhibits 48, 53, 57, J.A. at 210-212. The State nevertheless argues that the entire Capitol grounds, with all of the other monuments and displays, inside and outside, is a "museum." *See, e.g.,* Resp. Br. at 16.

First, the appropriate perspective is from the reasonable observer who walks by the Ten Commandments monument. In *County of Allegheny*, this Court declared the creche in the county courthouse unconstitutional, even though there were other symbols throughout the building. The Court explained that the "creche, with its floral flame, was its own display distinct from any other decorations or exhibitions in the building." 492 U.S. at 598 n.48. The same is true of the Texas Ten Commandments monument: it is its own display, distinct from any other decorations or exhibitions on the grounds of the Capitol. There is no reason to believe that a person seeing the Ten Commandments monument, or the creche in *County of Allegheny*, would associate it with any of the other symbols elsewhere on the government's property.

Second, the State's claim that its grounds are a museum is not credible. A museum contains a series of exhibits for a unified purpose, such as art, history, or science. The displays on the Texas grounds are not chosen by a curator for any such purpose. Rather, in Texas it is the legislature that chooses what to place on the grounds; it is a crime in Texas for anyone to place anything on the Capitol's grounds without the Texas legislature's permission and an impeachable offense for a government official to do so. Texas Gov't Code §2165.255.

Every monument on the Capitol's grounds is present because the legislature wanted to express a particular message: remembering the Alamo, honoring war veterans,

honoring children, and remembering Texas' role in the Confederacy. *See* Resp. Br. at 3-4. The Ten Commandments monument is there because the legislature wanted to convey the religious message that it contains.[7]

Finally, if one accepts the State's invitation to examine all the monuments on the Capitol's grounds, it is clear that one is different from all the others. Even by the State's description, only one monument contains sacred text. Only one expresses a religious message. The Ten Commandments monument is different from all the others and this context makes clear that it is an impermissible symbolic endorsement of religion.

3. The content of the Ten Commandments monument.

The content of the monument could not be more religious: a passage of scripture that some religions regard as sacred. At its top, in letters larger than used on the rest of the monument are the words "I AM the LORD thy God." As Justice Stevens explained in speaking of an identical monument, "'I AM the LORD thy God' . . . is rather hard to square with the proposition that the monument expresses no particular religious preference – particularly when considered in conjunction with . . . [the fact] that the monument depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ." *Elkhart v. Books*, 532 U.S. 1058 (2001) (Stevens, J., opinion respecting denial of certiorari).

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[7] In fact, the State took the monument down in 1990 and kept it in storage until it made the choice to reinstall it in 1993. (Stipulations 10, 11, J.A. at 91-92.) Other monuments have been taken down by the State and not reinstalled, but instead replaced with a small plaque. J.A. at 77.

The State, of course, cannot deny this religious content. Instead, it points to the "civic symbols" on the monument: an eye within a triangle emanating rays of light and an eagle grasping an American flag. But this surely does not change the overall content of the monument. A statue of Christ atop the State Capitol would not become permissible if there also were on it a small eagle grasping an American flag. To the contrary, the presence of the American flag heightens the violation of the Establishment Clause: "it specifically links religion . . . and civil government." *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

4. The location, the context and the content of the monument together are a clear symbolic endorsement of religion.

The State and its amici urge this Court to regard the Texas Ten Commandments monument as ceremonial deism, such as "In God We Trust" on coins. In a recent opinion, Justice O'Connor articulated four factors to use in determining whether a religious symbol is "ceremonial deism": "History and ubiquity," "Absence of worship or prayer," "Absence of reference to particular religion," and "Minimal religious content." *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2323-326 (2004) (O'Connor, J., concurring in the judgment).

The latter two factors especially explain why the Texas Ten Commandments monument is not ceremonial deism and nothing like "In God We Trust" on coins. The Texas Ten Commandments monument hardly fits the description of "minimal religious content." It is derived from Biblical passages. Exodus 20:2-17, Deuteronomy, 5:6-21. Much of the monument conveys rules for religious behavior: such as, "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images,"

"Thou shalt not take the name of the Lord thy God in vain," and "Remember the Sabbath Day."

Nor does the Texas Ten Commandments monument avoid reference to "particular religions." Not only are the Ten Commandments important to just some religions, but there are symbols of particular religions on the monument: the Greek letters symbolizing Christ and Stars of David.

The State's only attempt to answer this is its statement: "Indeed, the last two *Newdow* factors, in particular, do not fit well in an analysis of government acknowledgments of religion, because, by definition, such acknowledgments will reference religion and have some religious content." Resp. Br. at 43 n.31. But this is true only if the government, as here, chooses to have one religious symbol, by itself, in a prominent place on its property. The State admits, as it must, that under the latter two factors identified by Justice O'Connor in *Newdow*, the Ten Commandments monument is not ceremonial deism because of its expressly religious content and its blatant favoritism of some religions.[8]

[8] As to the first factor, "history and ubiquity," Respondent and especially its amici point to all of the Ten Commandments displays around the country. *See, e.g.*, U.S. Brief at 1a-7a. But as explained earlier, the vast majority of these displays are different from the Texas Ten Commandments monument because they involve the Ten Commandments accompanied by other symbols about the sources of law. Ten Commandments displays of the sort here are relatively new and at most there are a few hundred scattered around the country. Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 236 (2004).

CONCLUSION

Ultimately, this case comes down to two questions. First, are the Ten Commandments a religious symbol and a religious message? Second, may the government place one prominent religious symbol on its property, literally at the seat of its government? The former question was clearly answered in *Stone v. Graham* and the latter by *County of Allegheny v. ACLU*. Based on these precedents, and the long-standing principles they reflect, the decision of the United States Court of Appeals for the Fifth Circuit must be reversed.

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